

No. 15138

United States Court of Appeals
FOR THE NINTH CIRCUIT

A. T. LELLES, *Appellant*

vs.

UNITED STATES OF AMERICA, *Appellee*

PETITION FOR RE-HEARING

BRIEF OF PETITIONER

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It is respectfully submitted on this petition for re-hearing that this Court did not take into consideration all of the evidence in affirming the decision of the District Court.

It is our position that the evidence shows that Mr. A. T. Lelles could not have, and did not, manufacture the Cultured Mushroom Salt prior to 1950 in code numbers 102 and 103, and that when examined in 1950 and in subsequent years said product was approved by the United States Food & Drug Department.

The shipment made was lots 102 and 103 (Tr. 26).

Mr. William W. Wallace testified that in 1950 he examined lots 102 and 103 (Tr. 27) and signed a

report which was introduced in evidence and marked Exhibit A1 (Tr. 26). The government stipulated that according to the analysis made in 1950 there was nothing wrong with the Cultured Mushroom Salt and it could be shipped (Tr. 27).

Mr. William G. Lillas testified that he made the shipment in question, from which this indictment grew, and he said he shipped from lots 102 and 103, which were there before he started to work for the corporation (Tr. 52).

Mrs. May Isabel Moore testified that she had been working for the corporation since 1952 (Tr. 54) and she was familiar with lots 102 and 103.

"To my knowledge we did not have any other finished Cultured Mushroom Salt in cans for shipment other than Lot 102 and Lot 103 during the months of January and February 1955." (Tr. 55; italics supplied)

She also stated (Tr. 56) that there was only enough mushroom salt made in the hand experimental grinder to fill one shaker.

"I do not know that there was any Cultured Mushroom Salt from a hand experimental grinder on the premises during January and February, 1955. The hand experimental grinder was used temporarily, experimenting to make new products, not to make Cultured Mushroom Salt."

Mr. Lelles testified as to lots 102 and 103. The Food

& Drug Department had come into the office a number of times to take samples of this salt (Tr. 59) and never complained about the quality.

All the Cultured Mushroom Salt on the premises were from Lot 102 and 103. (Tr. 60; italics supplied)

He did not have the machinery to manufacture mushroom salt until March 22, 1955 (Tr. 60).

It is our contention that from the above cited evidence there is no question but that the shipment made was a product approved by the Food & Drug Department.

This Court, in its opinion (page 7) cited the testimony of the rebuttal witness who testified as an expert that in his opinion the Cultured Mushroom Salt analyzed in 1955 and in 1950 were different products. This Court then cited in the margin of the opinion the reasons. The reasons he gave, aside from the filth, are:

(2) 1950 samples had an appreciable amount of cornstarch, and the 1955 samples had only a few grains of cornstarch.

This substantiates the Appellant's position. He (A. T. Lelles) testified (Tr. 62) that the product of the Cultured Mushroom Salt that was analyzed in 1950 by William W. Wallace of the U.S. Food & Drug Department, was Cultured Mushroom Salt that was

manufactured prior to the year 1950. At that time several hundreds of cases of Cultured Mushroom Salt were manufactured with cultivated mushrooms and salt. Short time after the few hundreds of cases were manufactured, it was discovered that the Cultured Mushroom Salt was caking up in the shakers and it would not flow freely out of the shakers.

Then he (A. T. Lelles) went to the U.S. Food & Drug Department in Seattle and saw and talked to Mr. Rowe, who at that time was the head man of the Seattle office for the U.S. Food & Drug Department, and explained to Mr. Rowe that the Cultured Mushroom Salt that was manufactured with cultivated mushrooms and salt was caking up and would not flow freely out of the shakers.

After the conference Mr. Rowe advised him to mix some cornstarch with the cultivated mushrooms and the salt, and that the cornstarch would prevent the hard caking up and that the Cultured Mushroom Salt would flow freely out of the shakers.

On the advice of Mr. Rowe, cornstarch was added into the cultivated mushrooms and salt, and there was manufactured additional several hundreds of cases of Cultured Mushroom Salt. So the first several hundred of cases were manufactured without cornstarch

and the other several hundred cases were manufactured with cornstarch. All this happened prior to 1950.

William W. Wallace testified that the Cultured Mushroom Salt that he analyzed in 1950 (Tr. 84) had cornstarch in it. This is true, because it was from the lot that had cornstarch in it. The samples that William W. Wallace analyzed after February 1955 had no cornstarch in it because that lot was manufactured first without cornstarch, and the other was manufactured with cornstarch in it upon the advice of Mr. Rowe from the U. S. Food & Drug Dept.

Also the variation in the head space fill of the can shakers claimed by William W. Wallace, correctly comes about like this: The Cultured Mushroom Salt that had cultivated mushrooms, salt and cornstarch after the product was put in the shakers, because it is heavier in gravity than just cultivated mushrooms and salt, it settles and packs down in the shakers and it makes the head space fill of the shakers look less filled than the shakers that contained cultured mushroom salt made just with cultivated mushrooms and salt, and that is what Mr. William W. Wallace analyzed in 1950, the Cultured Mushroom Salt that contained cornstarch.

In 1955 Mr. William W. Wallace analyzed Cultured Mushroom Salt that contained cultivated mushrooms

and salt, of which the gravitation is lighter than the product that contained cornstarch in it. That is the reason why the variation was found in the head space fill. The shakers that contained Cultured Mushroom Salt without cornstarch, the head space looked fuller. The shakers that contained Cultured Mushroom Salt with cornstarch in it looked less full because the gravitation of the product is heavier and it settles and packs down. And that is what Mr. William W. Wallace analyzed after Februry 1955.

Mr. A. T. Lelles testified as to the Lot. No. 102 and Lot No. 103 that the Food & Drug Department had come into stockroom and the office of the Company a number of times, took other samples from Lot No. 102 and Lot No. 103 (Tr. 59) and never complained about the quality. All the Cultured Mushroom Salt in the premises were from Lot No. 102 and Lot No. 103.

The analysis cited by the Court in the decision is not inconsistent with the position of the appellant.

ANALYSIS OF DOTTERWEICH CASE

The Court felt that the present case was decided by the Supreme Court adversely to the position of the Appellant herein, and cited the case of *United States vs. Dotterweich*, 320 U. S. 277.

The Dotterweich case history shows that the Second

Circuit of Appeals in 131 Fed. (2d) 500, revised the conviction. The Supreme Court, on the appeal of the government, reversed the Circuit Court in a five to four decision.

The merits of our position is set out in the dissenting opinion of Justice Murphy. Justice Rutledge, Justice Reed and Justice Roberts concurred in the dissent.

It is our feeling that the case now before the Court can be distinguished from the Dotterweich case, and such distinguishing features are of such a nature that even the majority opinion would not reach the same results.

In the Dotterweich case the defendant was charged as President and General Manager of Buffalo Pharmacal Co., Inc. The jury disagreed as to the corporation and found the defendant guilty on two counts. The Circuit Court of Appeals found that the evidence was sufficient to support the verdict of adulteration and misbranding.

In the case befort the Court there was no evidence that the corporation named in the indictment was guilty. While it is true that the trial judge let it go to the jury he recognized his mistake after the verdict and corrected it by dismissing the corporation.

The corporation that committed the crime in this

case was not named in the indictment. We went to trial on the charge set forth in the indictment and that charge was against "Cultured Mushroom Industries, Inc., and A. T. Lelles, an individual, at the time President of said corporation * * *"

The Washington Mushroom Industries, Inc., according to all the evidence, violated the law, if there was a violation. It can only act, as every corporation acts, through its officers. Now if Lelles' conviction is allowed to stand, then he is convicted of acting in a capacity with which he is not charged. It may be true, as this Court said, that he was charged as an individual, but if that is true then there was no evidence to sustain a conviction. He did not fill the order, nor ship it. The theory of his individual liability arises from his association with the corporation; in this case, Washington Mushroom Industries, Inc., and, if so, then he is entitled under the Constitution of the United States, to know the charge so that he can properly defend himself.

The merit of the above line of reasoning is more clearly stated in Justice Murphy's dissenting opinion on pages 290 and 291 of the Dotterweich decision (*supra*).

It has been stated that for the good of the public, the

officers of a corporation are responsible as individuals for the illegal acts of said corporation. This is a recent extension of criminal liability, especially when it is extended to situations where the individual does not participate personally in the act. It is true that our objections to such legislation should be directed toward Congress but that does not mean we are to be deprived, prior to trial, of the knowledge of which corporation committed the offense.

The United States Attorney, until the dismissal, sought without avail to sustain the indictment to the effect that Lelles was the President of the Cultured Mushroom Industries, and, therefore, individually liable.

The trial judge, by dismissing the corporation, decided they did not commit the crime. In the Dotterweich case the jury disagreed but the man charged as its President and General Manager was found guilty.

It is respectfully submitted that there is no evidence; no effort was made by the Government to prove Lelles' individual liability, except in his corporate capacity. The case was allowed to go to the jury on his connection with a corporation not mentioned in the

indictment, and deprived the appellant of his constitutional rights to be informed before trial of the charge.

It is sincerely urged that this petition be granted.

Respectfully submitted,

JEFFREY HEIMAN

Attorney for Petitioner.